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October 20, 1954

George F. Nelson, Esq.,
Assistant Attorney General

Attorney General

Severance damages upon taking for public purposes of a separate but contiguous parcel of a common owner's mill holdings

Stanton C. Otis,
Right of Way Engineer
Dep't. of Public Works and Highways

Dear Sir:

The question presented by your October 18, 1954 request is one to which our courts have given no specific answer but have indicated that each case stands upon its own merits, so that consideration of the broad principles enunciated by the court is the best answer that can be given for your guidance.

"'The fact that the most profitable use could be made only in connection with other land is not conclusive against its /adaptability thereto/ being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price.' . . . New York City v. Sage, 239 U. S. 57, 61. '. . . It was open to the defendant to prove the market value of his land, by whatever circumstances or influences that value may have been affected.' Medina Valley etc. Co. v. Seekatz, 237 Fed. Rep. 805, 807. The true rule seems to be that the enhanced market value, if any, of the plaintiff's land due to its adaptability for valuable uses in conjunction with other properties may be shown if the practicability of the combination of all the necessary properties upon which such availability depends was at the time of the condemnation so great as to have probably affected the public mind, and therefore to have enhanced the price which a purchaser might be expected to give." Emmons v. Company, 83 N.H. 181, 185.

In the ascertainment of the market value of the plaintiff's property over which the highway was laid out, he is entitled to have it appraised for the most profitable or advantageous use to which it could be put at the time of taking. Davis v. State, 94 N.H. 323.

Whatever in its location, surroundings and appurtenances contributes to the availability of the land for valuable uses, is proper evidence to be considered in estimating its salable character and ascertaining its market value. Low v. R.R., 63 N.H. 557.

". . . it may be regarded as settled in this state, that the compensation or damages to which the landowner is entitled, is not limited to the value of the land actually

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- 2 -

taken, but that he is entitled to a just and fair compensation for the damage done to the whole tract through which the road passes; and in fixing what is left, arising from an inconvenient separation of the tract, requiring an additional outlay for fences, rendering the buildings less commodious, interrupting the supplies of water for cattle or irrigation and the like." Carpenter v. Landaff, 42 N.H. 218.

In this latter case the Court held that evidence of "a great increase in the amount of travelling, and in the business and profits" of a hotel "could not be considered to reduce his claim for damage done to his land" and" on the other hand, damages were not to be awarded for the anticipated injury to the landowner's business". Also, in the case of Philbrook v. Power Co., 75 N.H. 599, the Court stated that if the availability of plaintiff's farm for a summer boarding house made it more valuable than it otherwise would have been it was proper to consider that fact for the measure of damages is "the difference in the value of their farm before and after their meadow-land was flooded".

"No legal formula known to the law exists for the apportionment of the values of constituent properties which in the aggregate may be capable of development as a single power plant. The qualities, condition, extent and the prior use of the several tracts, as well as the part which each will play in the proposed unified property, so differ in kind and degree as to make any general rule inapplicable. On the other hand, if the landowner lays claim to an enhanced value of his property by reason of its adaptability by combination with other properties for a specified development it cannot be said as a matter of law that the evidence may not disclose facts which would justify comparisons of the several parts with the mooted whole, and give rise to inferences as to the relative importance and proportional value of each part to the whole; and that in such a case the value of the whole may not be of aid to the jury in working out the value of any constituent part. If in any given combination the proportional

value of the land taken could be thus deduced it would not, however, be the test of the landowner's damages. Such deduced value would only be evidence bearing upon what a purchaser, having in mind the prospective union of the several properties, would probably have paid for that of such landowner. As we have seen, it must be constantly borne in mind, that, in ascertaining the value of the landowner's property for any supposed combination, we are dealing with the separate properties before the taking, and not with a unified plant." Emmons v. Company, 83 N.H. 181, 187.

". . . 'So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.'

"The principles of the federal case have been adopted by this court not only in the Worcester case but in Low v. Railroad, 63 N.H. 557, 562, and have been followed in a long line of well considered cases in both federal and state courts. The doctrine of these cases fully sustains the conclusions we have reached, namely, that the plaintiff, in the proof of the market value of her land, is not restricted to evidence of its value for development within itself; but affords no basis for the plaintiff's position that she is entitled to share in the enhancement of the value of the constituent properties accruing to the defendant by reason of the union which it has effected." Emmons v. Company, 83 N.H. 181, 189.

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- 4 -

"Further force to show that the concept that property for purposes of taxation may be worth more than can be obtained for it does not prevail in our state, is found in Arlington Mills v. Salem, 83 N.H. 148, where it is said (158): 'It is sometimes good business to pay more for a thing than it will sell for in the market.' The converse is equally true that it may be bad business to sell a thing for what it may thus be sold. In either event the special and exclusive advantage to the owner is personal to him, rather than pertaining to the nature of the thing." Trustees etc. Academy v. Exeter, 92 N.H. 473, 485.

From the foregoing it may be seen that the precise solution is not readily available. However, it is my opinion that if used together the fact that the tract affected is only one of several contiguous tracts requires that assessment of damages be made as stated in City of Chicago v. Cruse, 169 N.E. 322, 337 Ill. 537, cited 29 C.J.S. 982, Eminent Domain, Sec. 140, Note 16.

"Where a parcel of land used as a part of an entire property is sought to be taken for public use, and the land sought to be taken is of greater value, considered as a part of the entire property, than if taken as a distinct and separate piece entirely disconnected from the residue, the just compensation for the part so taken is its fair cash or market value when considered in its relation to and as a part of the entire property, and not simply what may appear to be its value as a separate and distinct piece."

Very truly yours,

George F. Nelson
Assistant Attorney General

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